IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

JOSEPH SCIORTINO, *Petitioner,* AGAINST UNITED STATES OF AMERICA, *Respondent.*	No.

Brief in Support of Petition.

Opinions in the Court Below.

No opinion was rendered by the District Court.

No opinion was rendered by the Circuit Court of Appeals.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered November 12th, 1940 (R. 442). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the act of February 13th, 1925.

Questions Presented, Statement, Etc.

The questions presented, statement of the case, and the specification of errors relied upon are set out in the petition and further facts are stated under the points where necessary.

ARGUMENT.

POINT I.

The Evidence Was Utterly Insufficient.

The mere circumstance of a number of telephone call slips coupled with petitioner's casually being seen on the street or in a restaurant with those who may have been connected with an illicit still is not enough to establish a *prima facie* case of conspiracy.

Merely being seen with a participant in a crime about the time it is committed is not enough.

> *Courtney* v. *People,* 28 Hun 589, aff'd 94 N. Y. 490;
> *People* v. *Josephs,* 143 App. Div. (N. Y.) 522.

In *Falcone* v. *United States,* 109 F. (2nd) 579, the Circuit Court of Appeals (2nd Circuit) said:

> "It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use, he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today, when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.
>
> That there are opportunities of great oppression in such a doctrine is very plain and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided" (p. 581).

The Circuit Court further said in that case:

> "But it could not be inferred from that or from the casual and unexplained meetings of some of

> respondents with others who were convicted as conspirators that respondents knew of the conspiracy" (p. 582).

That case was reviewed in this Court. Certiorari granted 310 U. S. 620.

In affirming a reversal by the Circuit Court of Appeals, this Court in 311 U. S. 179 said:

> "The gist is the agreement among conspirators to commit an offense attended by an act of one or more conspirators to effect the object of the conspiracy. (See 37 Criminal Code, 18 U. S. Code, Sec. 88.) Those having no knowledge of the conspiracy are not conspirators. *United States* v. *Hirsch,* 100 U. S. 33, 34; *Weniger* v. *United States,* 47 F. (2nd) 692, 693."

In *Matter of Case,* 214 N. Y. 199, 203, 204, the Court of Appeals of New York said that

> "Insufficient evidence in the eyes of the law is no evidence."

A mere scintilla of evidence is insufficient.

> *Peo.* v. *Ledwon,* 153 N. Y. 10;
> *Peo.* v. *Gluck,* 188 N. Y. 167.

POINT II.

Affirmance by the lower court is in conflict with a later decision by this court.

The decision of the Circuit Court of Appeals is in conflict with *Falcone* v. *United States,* 311 U. S. 179 decided at this term of Court and therefore merits review.

> *Joplin Mercantile Co.* v. *United States,* 236 U. S. 531.

CONCLUSION.

This petition for a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals for the Second Circuit as to petitioner Sciortino and finally reverse it.

Respectfully submitted,

Leo H. Klugherz,
Counsel for Petitioner,
Joseph Sciortino.

William I. Cohen,
Max Schultz,
Of Counsel.